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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: March 26, 2009  
Date of Order: March 31, 2009

**+ OMP 80/2009**

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**31.03.2009**

**M/s Jay Polychem (India) Ltd.**

**...Petitioner**

Through: Arun Bhardwaj, Sr. Adv. with Mr. Vineet Malhotra, Advocates

Versus

**Kotak Mahindra Bank Ltd.**

**...Respondent**

Through: Mr. Rajiv Nayyar, Sr. Adv. with Mr. Arjun Pant, Advocates

**JUSTICE SHIV NARAYAN DHINGRA**

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

**JUDGMENT**

1. By this application under Section 9 of the Arbitration & Conciliation Act, 1996 (for short, "the Act") the petitioner has sought the relief that this Court should restrain the respondent from proceeding further under notice dated 16<sup>th</sup> October 2008 and a letter dated 2<sup>nd</sup> February 2009, either itself or through committee constituted by it.

2. Vide letter dated 16<sup>th</sup> October 2008, the respondent, through its head office in Mumbai, informed the petitioner that the petitioner was in willful and deliberate default in making payment of the dues of respondent bank despite having adequate cash flow and capacity to pay. The respondent, therefore, proposed to classify the petitioner as a 'willful defaulter' under the Scheme of "Disclosure of Information on Defaulting Borrowers of Bank and Financial

Institutions” introduced by the Reserve Bank of India vide circular dated 23<sup>rd</sup> April 1994, as amended from time to time. A show cause notice was given to the petitioner as to why the respondent company should not classify the petitioner as a willful defaulter. The petitioner was given an opportunity to make submissions before the ‘committee for willful defaults’. The committee after considering the submissions made by the petitioner was to take a decision. The petitioner was asked to give its reply/ submissions within 15 days of the receipt of the show cause notice at the Mumbai address of the respondent in the office of Mr. Prakash Jyodakar.

3. Vide letter dated 2<sup>nd</sup> February 2009, the petitioner was informed by the respondent that his reply dated 30<sup>th</sup> October 2008 to the show cause notice had been received in the office and the same has been forwarded to the ‘Grievance Redressal Committee’ of the Bank and he should appear before the Grievance Redressal Committee on 19<sup>th</sup> February 2009 at Mumbai.

4. Notice of this application under Section 9 of the Arbitration & Conciliation Act, 1996 was accepted by the respondent on the very first day and the respondent raised objections about the territorial jurisdiction of this Court. The respondent filed its response by filing counter affidavit and some documents along with it.

5. Learned counsel for the petitioner vehemently argued that the contract between the parties, out of which dispute arose, was executed in Delhi and it was the Delhi Court which was the Court of appropriate jurisdiction. It is submitted by counsel for the petitioner that the respondent had lured and coerced the petitioner to enter into contract on 23<sup>rd</sup> July 2007 and nothing

was due towards the bank. The petitioner was prepared to deposit Rs.1.5 crore with the Registrar of this Court to show his *bonafide* but the respondent was unnecessarily dragging the petitioner to Mumbai Courts whereas the appropriate Court would be the Court of Delhi.

6. The petitioner also contended that the agreement as arrived at between the parties though contained a clause that only Court in Mumbai shall have exclusive jurisdiction but this clause was void being contrary to the settled proposition of law that the parties cannot by mutual consent confer jurisdiction on the Court which actually does not have it. The parties can only agree to exclude the jurisdiction of one Court where more than one Court have jurisdiction. On the other hand, counsel for the respondent argued that the contract relied upon by the petitioner specifically provides that only Courts at Mumbai shall have jurisdiction. The head office of the respondent was at Mumbai. The contract provides that all actions of branch office of the respondent shall be considered to be the actions of the head office of the respondent situated at Mumbai. The cause of action also had arisen at Mumbai, therefore, only Courts at Mumbai shall have the jurisdiction.

7. Section 9 of the Arbitration & Conciliation Act, 1996 gives powers to the Courts to entertain the application seeking interim measures of protection in respect of the matters provided therein. Section 2(1) (e) of the said Act defines the Court as under:-

*“Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having, jurisdiction to decide the questions forming the subject-matter of the arbitration if the*

*same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*

8. It is apparent that an application under Section 9 of the Act can be entertained by a principal civil Court of original jurisdiction (including High Courts) which would have the jurisdiction to decide the question forming the subject matter if the same had been the subject matter of a suit. One has to ask if the petitioner had filed the suit claiming relief which he claimed in the petition under Section 9 of the said Act, would this Court have territorial jurisdiction to entertain the suit?

9. In the application made by the petitioner, the petitioner had categorically stated that the cause of action arose when the respondent issued notice dated 16<sup>th</sup> October 2008 and then issued letter dated 2<sup>nd</sup> February 2009 fixing date of hearing before the Committee on 19<sup>th</sup> February 2009. The respondent was situated at Mumbai and the respondent had issued letters/ notice asking for show cause as to why the petitioner be not declared a 'willful defaulter' and his name be not sent by the respondent to RBI from its head office at Mumbai. Thus the cause of action arose in Mumbai and not in Delhi. Hence the Court at Mumbai would be appropriate Court despite the fact that the letter/ notice was received by the petitioner in Delhi because the petitioner had specifically agreed in the contract dated 23<sup>rd</sup> July 2007 that only Court in Mumbai shall have the jurisdiction. The jurisdiction clause and the arbitration clause as provided in the contract read as under:

*"(i) Governing Law, Jurisdiction and Arbitration  
Sub-clause (a), Sub-Clause (c) of Section 13 of the  
Agreement are hereby deleted in their entirety and*

*substituted by the following new Sub-Clause (a), Sub-Clause (b) and Sub-clause (c) of Section 13:*

*(a) Governing Law. This Agreement will be governed by and constructed in accordance with the laws of India.*

*(b) Dispute Resolution.*

*(i) If any difference, dispute or question shall arise between the parties as to the interpretation, meaning or effect of this agreement or as to the rights and liabilities of the parties arising hereunder or as to any other matter or things relating to this agreement or arising out of or in connection herewith either during the continuance of this agreement or after any termination or purported termination hereof, the same shall be referred to a Sole Arbitrator who shall be appointed by Party 'X' and whose decision shall be governed by the provisions of Arbitration & Conciliation Act, 1996 or any statutory modification or reenactment thereof and the venue of the Arbitration shall be at Mumbai.*

*(ii) The language of the arbitration shall be English and (all) the arbitrator shall be fluent in English.*

*(iii) The Tribunal shall state the reason for its decisions in writing and shall not make such decisions on the basis of the principle of ex aquo et bono or as amiable compositeur;*

*(iv) Subject to the provisions of Sub-clause (b) above, the courts of competent jurisdiction at Mumbai shall have exclusive jurisdiction with respect to any suit, action or any other proceedings relating to this Agreement including in relation to any arbitration award."*

10. It is also to be noted that the respondent had already filed a claim before the Debt Recovery Tribunal – III at Mumbai where the petitioner filed

an application challenging the jurisdiction of Mumbai Tribunal and the Debt Recovery Tribunal at Mumbai by an order dated 6<sup>th</sup> February 2009 dismissed the application observing inter alia that Mumbai Court as well as Delhi Court both would have jurisdiction to try the case.

11. Looking into the agreement between the parties and the specific clause wherein parties had agreed that the Mumbai Court will have the jurisdiction, I consider that this Court, has no territorial jurisdiction to entertain the instant petition. The petition is hereby dismissed. No costs.

**March 31, 2009**  
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**SHIV NARAYAN DHINGRA J.**